

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL A. HOWL,

No. C 11-887 CW

Plaintiff,

ORDER GRANTING  
DEFENDANTS' MOTION  
TO DISMISS (Docket  
No. 63)

v.

BANK OF AMERICA, N.A.; BAC HOME  
LOAN SERVICING, LP; PRLAP, INC.;  
RECONTRUST, N.A.; and DOES 1-50,

Defendants.

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Plaintiff Michael A. Howl brings the instant mortgage-related suit against Defendants Bank of America, N.A., BAC Home Loan Servicing, LP, PRLAP, Inc. and ReconTrust Company, N.A. In his second amended complaint (2AC), Plaintiff asserts a claim that Bank of America and BAC Home Loan Servicing breached a mortgage contract with him. Plaintiff also asserts a claim for violation of the Real Estate Settlement Procedures Act (RESPA) against BAC Home Loan Servicing and ReconTrust. Defendants move to dismiss Plaintiff's 2AC. Plaintiff opposes the motion. Having considered the papers filed by the parties, the Court GRANTS Defendants' motion.

BACKGROUND

The facts set forth herein are those alleged in Plaintiff's 2AC and in the documents of which Defendants have requested judicial notice, without objection from Plaintiff.

Bank of America engages in mortgage lending and the other Defendants all engage in mortgage servicing. 2AC ¶¶ 2-5.

1 On or about August 23, 2007, Plaintiff obtained a loan from  
2 Bank of America for \$1.5 million, secured by a deed of trust for  
3 his home located at 288 Love Lane in Danville, California. Id. at  
4 ¶ 11. Plaintiff has attached to his 2AC the Adjustable Rate Note  
5 for the loan, but not the deed of trust. 2AC, Ex. A.

6 Prior to, and at the time of, the execution of the loan  
7 agreement, Jared Hayward, a mortgage broker, who was purportedly  
8 an agent of Bank of America, made certain representations to  
9 Plaintiff. 2AC ¶¶ 13-15. Hayward orally communicated to  
10 Plaintiff "that there was to be no prepayment penalty and that any  
11 payment would be applied to principal as described in Paragraph 3c  
12 of the contract." Id. at ¶ 13. On August 10, 2007, in response  
13 to an email from Plaintiff in which he questioned why there was a  
14 "prepay" listed on the "disclosures," Hayward stated in an email,  
15 "There is no prepay. It was filled in by accident. You can cross  
16 [off] and initial. Sorry, Jared." Id. In addition, at the time  
17 that the loan was executed, Hayward told Plaintiff that "the  
18 interest rate would be tied to an independent, impartial index  
19 known as the LIBOR as reported in the Wall Street Journal, and  
20 furthermore that his loan rate would be based on the amount of the  
21 LIBOR in the 45 days prior to his loan." Id. at ¶ 14. Hayward  
22 also informed him that "the benefit of an adjustable loan is that  
23 if interest rates go down you can benefit from a greatly reduced  
24 interest rate," and gave as an example that "if the LIBOR went  
25 down to 1% the total interest rate would be 3.250." Id. at ¶ 15.

26 Sections two and four of the Adjustable Rate Note between  
27 Plaintiff and Bank of America address the interest rate on the  
28 loan. Section two provides that Plaintiff "will pay interest at a

1 yearly rate of 8.125%" and that the "interest rate will change in  
2 accordance with Section 4 of this Note." 2AC, Ex. A, 1. Section  
3 4(A) states, "The interest rate I will pay may change on the FIRST  
4 day of October, 2012 and on that day every 12th month thereafter,"  
5 which is referred to as the "Change Date." Id. at 2. Section  
6 4(B) provides, "Beginning with the first Change Date, my interest  
7 rate will be based on an Index. The 'Index' is: THE ONE-YEAR  
8 LONDON INTERBANK OFFERED RATE ("LIBOR") WHICH IS THE AVERAGE OF  
9 INTERBANK OFFERED RATES FOR ONE-YEAR U.S. DOLLAR-DENOMINATED  
10 DEPOSITS IN THE LONDON MARKETS, AS PUBLISHED IN THE WALL STREET  
11 JOURNAL. . . ." Id. Section 4(D) sets forth limits on interest  
12 rate changes and states,

13       The interest rate I am required to pay at the first  
14       Change Date will not be greater than 13.125% or less  
15       than 3.125%. Thereafter, my interest rate will never be  
16       increased or decreased on any single Change Date by more  
17       than TWO percentage points (2.000%) from the rate of  
18       interest I have been paying for the preceding period.

19 Id. at 3.

20       Section three of the Note addresses payments. It provides,  
21 "Beginning on the FIRST day of the NOVEMBER, 2007 and on the FIRST  
22 day of every month thereafter until the FIRST day of November,  
23 2017, I will pay only the interest on the unpaid principal balance  
24 of the Note. Thereafter, I will pay principal and interest by  
25 making payments every month as provided below." Id. at 1.

26       Section 3(A) provides in part that each monthly payment "will be  
27 applied to interest before Principal." Id. Section 3(B) states  
28 that the "initial monthly payments will be in the amount of U.S.  
\$10,156.25" and further states, "This amount may change." Id. at  
2. Section 3(C) states, "Changes in my monthly payment will

1 reflect changes in the unpaid principal of my loan and in the  
2 interest rate that I must pay," and that the note holder would  
3 calculate the "changed amount of my monthly payment in accordance  
4 with Section 4 of this Note." Id. In turn, Section 4(C) provides  
5 that, during the interest-only payment period, after calculating  
6 the new interest rate at the Change Date, the note holder would  
7 then determine the new amount of the monthly payment by  
8 calculating "the amount of the monthly payment that would be  
9 sufficient to pay the interest which accrues on the unpaid  
10 principal of my loan." Id. at 2.

11 Section five addresses Plaintiff's right to prepay. It  
12 states in relevant part,

13 I HAVE THE RIGHT TO MAKE PAYMENTS OF PRINCIPAL AT ANY  
14 TIME BEFORE THEY ARE DUE. A PAYMENT OF PRINCIPAL ONLY  
15 IS KNOWN "PREPAYMENT." WHEN I MAKE A PREPAYMENT, I WILL  
16 TELL THE NOTE HOLDER IN WRITING THAT I AM DOING SO . . .

17 I MAY MAKE A FULL PREPAYMENT OR PARTIAL PREPAYMENT  
18 WITHOUT PAYING A PREPAYMENT CHARGE. AFTER PAYING ANY  
19 LATE FEES OR OUTSTANDING FEES THAT I OWE, THE NOTE  
20 HOLDER WILL USE MY PREPAYMENTS TO REDUCE THE AMOUNT OF  
21 PRINCIPAL THAT I OWE UNDER THIS NOTE. HOWEVER, THE NOTE  
22 HOLDER MAY APPLY MY PREPAYMENT TO THE ACCRUED AND UNPAID  
23 INTEREST ON THE PREPAYMENT AMOUNT BEFORE APPLYING MY  
24 PREPAYMENT TO REDUCE THE PRINCIPAL AMOUNT OF THE NOTE.  
25 . . . IF THE PARTIAL PREPAYMENT IS MADE DURING THE  
26 PERIOD WHEN MY MONTHLY PAYMENTS CONSIST ONLY OF  
27 INTEREST, THE AMOUNT OF THE MONTHLY PAYMENTS WILL  
28 DECREASE FOR THE REMAINDER OF THE TERM WHEN MY PAYMENTS  
CONSIST ONLY OF INTEREST. . . .

Id. at 3.

29 Finally, Section seven addresses Plaintiff's failure to pay  
30 as required. Section 7(B) provides, "If I do not pay the full  
31 amount of each monthly payment on the date it is due, I will be in  
32 default." Id. at 4. Section 7(C) states, "If I am in default,  
33 the Note Holder may send me a written notice telling me that if I

1 do not pay the overdue amount by a certain date, the Note Holder  
2 may require me to pay immediately the full amount of Principal  
3 which has not been paid and all the interest that I owe on that  
4 amount." Id.

5 Plaintiff alleges that he made twenty-three prepayments but  
6 that Bank of America and BAC Home Loan Servicing only show that he  
7 made twenty-one prepayments and that they did not calculate the  
8 remaining prepayments correctly. 2AC ¶ 12. In August 2007,  
9 Plaintiff made a payment of \$10,684.80; he states that \$528.55 of  
10 this payment should have been used to reduce the principal balance  
11 from \$1.5 million to about \$1,499,471. Id. However, Bank of  
12 America and BAC Home Loan Servicing continued to charge him  
13 interest on the original principal of \$1.5 million and did not  
14 credit this amount to his account. Id. In September 2007, they  
15 charged Plaintiff \$10,350.90 in interest, which was higher than  
16 the amount stated in the Note for the monthly interest-only  
17 payment. Id. Although he paid that amount, the \$198.23 he paid  
18 in addition to the \$10,152.67 that was set forth in the Note for  
19 the monthly interest-only payment amount was not applied to reduce  
20 the principal and he continued to be charged interest on the full  
21 \$1.5 million. Id. On November 1, 2007, Plaintiff made a payment  
22 of \$11,000. Id. He states that, for the first time, Bank of  
23 America and BAC Home Loan Servicing gave him credit for a  
24 prepayment of principal but that they reduced the principal by  
25 \$843.75 and should have reduced it by \$848.67. Id.

26 Plaintiff alleges that, as of June 2009, he had paid  
27 \$223,601.25 in total toward his loan but that Bank of America and  
28 BAC Home Loan Servicing are "only giving credit for \$202,816.45"

1 and that he was current on his loan when these Defendants claimed  
2 that he was delinquent and refused to accept additional payments.  
3 Id. at ¶¶ 12, 29.

4 Plaintiff also alleges that the "LIBOR 12 month rate in  
5 August of 2007 was 5.186%," "that the added margin of 2.25% would  
6 make the correct agreed interest rate for the loan 7.436 percent"  
7 and thus that the initial 8.125 percent interest rate included in  
8 the loan was improper. Id. at ¶ 24. He further contends that the  
9 two percent limit on the changes in the interest rate in the Note  
10 contradicted Hayward's representation to him that his rate would  
11 decrease as the LIBOR decreased. Id. at ¶¶ 15, 23-24. In  
12 addition, he contends that Bank of America improperly manipulated  
13 the LIBOR rate in order to collect a higher interest rate. Id. at  
14 ¶¶ 19-22, 26.

15 On September 14, 2010, ReconTrust recorded a Notice of  
16 Default and Election to Sell Under Deed of Trust. 2AC ¶ 28;  
17 Request for Judicial Notice (RJN), Ex. C. The Notice of Default  
18 stated that Plaintiff failed to make the payment due on June 1,  
19 2009 and all subsequent payments. RJN, Ex. C, 2. On the Notice  
20 of Default, ReconTrust is identified as the agent of the  
21 Beneficiary, Bank of America. Id. The Notice of Default also  
22 provides,

23 To find out the amount you must pay, or to arrange for  
24 payment to stop the foreclosure, or if your property is  
in foreclosure for any other reason, contact:

25 BANK OF AMERICA, N.A.

26 C/O BAC Home Loans Servicing, LP

27 400 COUNTRYWIDE WAY SV-35

28 SIMI VALLEY, CA 93065

FORECLOSURE DEPARTMENT (800)669-6650

Id.

Plaintiff alleges that, on October 8, 2010, he sent a letter "to BAC Home Loan and ReconTrust after receiving a letter from ReonTrust dated October 1, 2010." 2AC ¶ 34 (errors in original). However, the letter that he attached to the 2AC as Exhibit 2 is addressed to "ReconTrust c/o BAC Home Loan Servicing." 2AC ¶ 33, Ex. 2. Plaintiff states in the 2AC that this was "his second request." 2AC ¶ 34. In the letter, Plaintiff wrote,

I received the packet of information that you provided me regarding the loan described above for real estate at 288 Love Lane in Danville, CA. However, there are multiple problems with the accounting. In escrow I paid \$10,684.80 to the loan in August 2007 but that payment does not show on the statement. In addition, the initial interest on the contract was to be \$10,156.25 monthly but reduced if principal payments were made and I made several principal payments . . . Furthermore, at the start of the loan I made additional payments each month that would reduce the principal however, the stated interest in the second and third months are the initial contract amount of \$10,156.25. In addition the amount of interest charged in October of 2007 was \$10,350.90 which is too high. I made payments of more than 20,000 dollars more than what is shown on the total payments when added together.

In addition, I would like for you to provide the documentation that shows or confirms your authority to act on behalf of Bank of America. I did receive the Deed of Trust and promissory note from you but it only refers to Bank of America and does not tie in your authority in any way. What is your authority to service the loan and why are you not showing the full amount of my payments made for the loan?

2AC, Ex. B.

Plaintiff states that neither ReconTrust nor BAC Home Loan Servicing responded to his October 8, 2010 letter. 2AC ¶ 35. He alleges that, as a result of the lack of a response, he incurred damages, including expenses related to filing this lawsuit, the

1 additional interest and fees that Bank of America and BAC Home  
2 Loan Servicing continued to charge after he sent the letter,  
3 "higher interest rates being charged against his account" and  
4 "loss of principal payments that were not credited to his account  
5 in the amount in excess of \$20,000.00." Id.

6 On December 16, 2010, ReconTrust, as trustee, recorded a  
7 Notice of Trustee's Sale. RJN, Ex. D.

8 Plaintiff filed his action in Contra Costa County Superior  
9 Court on January 21, 2011 and recorded a Notice of Pending Action  
10 on March 4, 2011. Docket No. 1; RJN, Ex. E. Defendants removed  
11 Plaintiff's action to federal court on February 24, 2011.

12 On June 6, 2011, ReconTrust recorded a Notice of Rescission  
13 of Declaration of Default and Demand for Sale and of Notice of  
14 Default and Election to Sell. RJN, Ex. F.

15 On August 17, 2011, upon motion from Defendants, the Court  
16 dismissed Plaintiff's first complaint and granted him leave to  
17 amend certain claims. Docket No. 36.

18 On August 30, 2011, Plaintiff filed his first amended  
19 complaint (1AC). Docket No. 38. In it, he re-asserted certain  
20 claims from his original complaint and added several new claims,  
21 including a claim for breach of contract and a claim against BAC  
22 Home Loan Servicing only for violation of RESPA. In his  
23 opposition to Defendants' motion to dismiss the 1AC, Plaintiff  
24 clarified that his new breach of contract claim was asserted  
25 against Bank of America only. Docket No. 46, 2.

26 On March 19, 2012, the Court granted Defendants' motion to  
27 dismiss the 1AC. Docket No. 61. At that time, the Court granted  
28 Plaintiff leave to amend his breach of contract claim against Bank



1 of America and his RESPA claim against BAC Home Loan Servicing to  
2 address the deficiencies identified in that order. The Court also  
3 stated, "In an amended complaint, Plaintiff shall not renew any  
4 claims other than the two noted herein and shall not raise any new  
5 claims." Id. at 18.

6 Defendants now move to dismiss the 2AC in its entirety.

#### 7 LEGAL STANDARD

8 A complaint must contain a "short and plain statement of the  
9 claim showing that the pleader is entitled to relief." Fed. R.  
10 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to  
11 state a claim, dismissal is appropriate only when the complaint  
12 does not give the defendant fair notice of a legally cognizable  
13 claim and the grounds on which it rests. Bell Atl. Corp. v.  
14 Twombly, 550 U.S. 544, 555 (2007). In considering whether the  
15 complaint is sufficient to state a claim, the court will take all  
16 material allegations as true and construe them in the light most  
17 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d  
18 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
19 to legal conclusions; "threadbare recitals of the elements of a  
20 cause of action, supported by mere conclusory statements," are not  
21 taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)  
22 (citing Twombly, 550 U.S. at 555).

23 When granting a motion to dismiss, the court is generally  
24 required to grant the plaintiff leave to amend, even if no request  
25 to amend the pleading was made, unless amendment would be futile.  
26 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
27 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
28 amendment would be futile, the court examines whether the

1 complaint could be amended to cure the defect requiring dismissal  
2 "without contradicting any of the allegations of [the] original  
3 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
4 Cir. 1990).

#### 5 DISCUSSION

##### 6 I. Breach of contract claim

7 In his breach of contract claim, Plaintiff alleges that Bank  
8 of America and BAC Home Loan Servicing breached the Note when they  
9 failed properly to apply his payments to his account, "claimed  
10 that Plaintiff was delinquent and attempted to collect additional  
11 money in excess of the amount due under the terms of the contract"  
12 and by "failing to properly credit payments and continuing to file  
13 a Notice of Default and Notice of Trustee Sale in violation of the  
14 terms of the Contract." 2AC ¶¶ 29-31. Plaintiff also appears to  
15 allege that these Defendants were in breach by charging him more  
16 interest than permitted by the contract. Defendants move to  
17 dismiss this claim in its entirety.

18 The Court grants the motion to dismiss this claim as to BAC  
19 Home Loan Servicing. In the briefing related to the prior motion  
20 to dismiss, Defendants argued that Plaintiff had not plead which  
21 Defendants were the subject of each of his claims and thus had not  
22 provided Defendants with sufficient notice of the claims against  
23 them. Plaintiff responded, in relevant part, for his first cause  
24 of action, which was for breach of contract, "defendant Bank of  
25 America was clearly stated as the breaching party." Docket No.  
26 46, 2. Plaintiff did not identify any other Defendant as the  
27 subject of that claim and he went on to defend the sufficiency of  
28 his allegations for the claim as to only Bank of America. In part

1 in reliance on Plaintiff's representation that this claim was  
2 asserted against Bank of America only, the Court found that  
3 Plaintiff had provided sufficient notice to Defendants of the  
4 conduct with which each was accused. Docket No. 61, 3-4. In  
5 granting Plaintiff leave to amend his breach of contract claim,  
6 the Court gave permission to do so only against Bank of America  
7 and did not allow Plaintiff to raise new claims for which it had  
8 not granted leave. Id. at 7, 18. Thus, Plaintiff was not  
9 permitted to assert a breach of contract claim against BAC Home  
10 Loan Servicing in his 2AC.

11 To assert a cause of action for breach of contract, a  
12 plaintiff must plead: (1) the existence of a contract; (2) the  
13 plaintiff's performance or excuse for non-performance; (3) the  
14 defendant's breach; and (4) damages to the plaintiff as a result  
15 of the breach. Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas  
16 Co., 116 Cal. App. 4th 1375, 1391 n.6 (2004).

17 Defendants argue that this claim fails in its entirety for a  
18 number of reasons. First, Defendants contend that Plaintiff  
19 failed to set out verbatim the terms of the Deed of Trust that  
20 were breached or to attach a copy of that document to his 2AC.  
21 However, Plaintiff has alleged that Defendants breached the  
22 provisions of the Adjustable Rate Note, not the Deed of Trust, and  
23 he did attach that document to his pleading.

24 Second, Defendants argue that, to the extent that Plaintiff's  
25 breach of contract claim is based on the oral representations made  
26 by Hayward about the interest rate for the loan, such claims are  
27 barred because they were not brought within the two year statute  
28 of limitations for breach of an oral contract, they are barred by

1 the statute of fraud and any oral representations were superseded  
2 by the written and agreed upon terms contained in the Note, Deed  
3 of Trust and adjustable rate rider. Plaintiff does not address  
4 these arguments and instead responds that he did not intend to  
5 allege that there was an oral contract and that he instead  
6 included the written and verbal comments made by Hayward in order  
7 to help show that the parties had intended to allow prepayments  
8 under the contract. Thus, Plaintiff has repudiated any reliance  
9 on the representations that Hayward made outside of the contract  
10 as the basis for his breach of contract claim. He also points to  
11 no other basis for a claim that Defendants breached the agreement  
12 by charging him an interest rate other than the initial 8.125  
13 percent interest rate set forth in the Note or by charging him an  
14 initial interest rate that was not tied to "an independent,  
15 impartial LIBOR rate." Accordingly, the Court grants Defendants'  
16 motion to dismiss the breach of contract claim to the extent it is  
17 predicated on these allegations.

18 Third, Defendants argue that Plaintiff has not specifically  
19 identified any provision of the Note that was breached by their  
20 purported failure to credit the prepayments to his account. They  
21 contend that the sections of the Note that Plaintiff points to in  
22 his 2AC "do not concern how payments are credited to the loan."  
23 Mot. at 5. This argument is unavailing. Section five sets forth  
24 how prepayments are to be credited to the loan. Section three  
25 addresses this for regular monthly payments and provides that  
26 these will be applied to interest before principal.

27 However, Defendants also argue that Plaintiff has not  
28 sufficiently plead that Bank of America breached the contract by

1 failing properly to credit his prepayments to his account because  
2 he has not plead that he notified Bank of America in writing of  
3 the prepayments. As set forth above, Section five of the Note  
4 obliged Plaintiff, when making prepayments, to "tell the note  
5 holder in writing that" he was "doing so." 2AC, Ex. A, 3.  
6 Plaintiff has not plead that he did so and did not respond to  
7 Defendants' argument in his opposition. Because Plaintiff has not  
8 plead that he met the requirements in the contract to have a  
9 prepayment applied to his account, Plaintiff has not sufficiently  
10 plead that Defendants breached the contract by failing to credit  
11 these properly.

12 Further, Plaintiff has not plead facts that would support a  
13 finding that the payments that Plaintiff sent to Defendants in  
14 August and September 2007 were monthly payments subject to the  
15 provisions of Section three of the Note, rather than Section five  
16 which addresses prepayments. As Defendants point out, Section  
17 three states that his monthly payments would begin on November 1,  
18 2007. Although Plaintiff is correct that he had a right to make  
19 prepayments to his account prior to that date, he was required to  
20 do so in accordance with the prepayment provisions of the Note.<sup>1</sup>

21 In addition, Defendants contend that, aside from the payments  
22 made in August and September 2007, Plaintiff does not offer  
23 sufficient factual allegations about any of the more than twenty  
24 other payments that Defendants purportedly failed to credit  
25 \_\_\_\_\_

26 <sup>1</sup> The Court notes that such a result does not bar Plaintiff  
27 from seeking recovery in state court of the money that he paid to  
28 Defendants and was never credited to his account under a quasi-  
contract or quantum meruit theory. The Court does not opine as to  
whether there may other barriers to such a claim.

1 properly to Plaintiff's account. Plaintiff responds that  
2 paragraph twelve of the 2AC provides sufficient notice of the  
3 payments that were made and not credited to his account.

4 In that paragraph, Plaintiff provides details of only one  
5 additional instance in which he states that Defendants failed  
6 properly to apply a payment to his account. He states that, on  
7 November 1, 2007, he made a payment of \$11,000 and Defendants gave  
8 him "credit for prepayment of principal in the amount of \$843.75."  
9 2AC ¶ 12. This corresponds to the amount that Plaintiff paid in  
10 addition to the regular monthly payment amount specified in the  
11 Note, which was \$10,156.25. Plaintiff alleges that this amount  
12 was incorrect and that instead his payment for interest should  
13 have been \$10,151.33 and \$848.67 should have gone to prepayment of  
14 principal. Id. Plaintiff does not directly state why the amount  
15 Defendants applied to principal was incorrect or what provision of  
16 the agreement they violated by applying this amount. On the face  
17 of the complaint, the calculation appears to have been done in  
18 compliance with Section 3(A) of the Note, which specifies the  
19 amount of the initial interest-only payment. To the extent that  
20 Plaintiff intended to state that the interest-only payment should  
21 have been lower because the August and September 2007 prepayments  
22 should have reduced his outstanding principal, thereby lowering  
23 the amount sufficient to pay the interest that accrued on the  
24 unpaid principal of the loan, this is simply a restatement of the  
25 allegation that Defendants breached the agreement by failing  
26 properly to credit those prepayments, which Plaintiff has failed  
27 to plead sufficiently as set forth above. To the extent that  
28 Plaintiff alleges that the calculation was done improperly for

1 some other reason, he does not state which provisions he alleges  
2 Defendants violated or how their crediting of his payments  
3 violated any particular provisions. Plaintiff also does not plead  
4 sufficient facts as to how Defendants failed to calculate  
5 correctly or apply the other twenty prepayments and what provision  
6 they violated in doing so.

7 Accordingly, the Court GRANTS Defendants' motion to dismiss  
8 Plaintiff's breach of contract claim against Bank of America.  
9 Because Plaintiff has had an opportunity to correct the  
10 deficiencies in this claim, dismissal is without leave to amend.

11 II. RESPA claim

12 In his RESPA claim, Plaintiff alleges that BAC Home Loan  
13 Servicing and ReconTrust failed to respond to his October 8, 2010  
14 qualified written request for information, in which he sought  
15 information regarding the amount apparently owed on the loan and  
16 their authority in relation to a debt that had originated with  
17 Bank of America, in violation of 12 U.S.C. § 2605. Defendants  
18 move to dismiss this claim in its entirety.

19 The Court grants the motion to dismiss this claim as to  
20 ReconTrust. In Plaintiff's 1AC, he specifically stated asserted  
21 his RESPA claim against BAC Home Loan Servicing only. 1AC at  
22 4:10-11 ("2nd Cause of Action Violation of RESPA against BAC Home  
23 Loan Servicing"). In granting Plaintiff leave to amend his RESPA  
24 claim, the Court gave permission to do so only against BAC Home  
25 Loan Servicing only and did not allow Plaintiff to raise new  
26 claims. Id. at 9, 18. Thus, Plaintiff was not permitted to  
27 assert a RESPA claim against ReconTrust in his 2AC.

Defendants argue that the October 8, 2010 letter was sent to ReconTrust and was not directed to BAC Home Loan Servicing, and thus that this claim cannot be maintained against the latter based on this letter. Plaintiff responds that, even though the letter was addressed to "ReconTrust c/o BAC Home Loan Servicing," he has sufficiently stated a RESPA claim because BAC Home Loan Servicing appears in the address of the letter and because he alleges in the body of the 2AC that he sent the qualified written request to the "proper entity." Opp. at 7. In his opposition, Plaintiff explains that, sometime before October 2010, he had sent a prior qualified written request to BAC Home Loan Servicing and that, in response to the first letter, he received a response from ReconTrust on October 1, 2010, a copy of which he attaches to his brief. Opp. at 7, Ex. A.<sup>2</sup> In the October 1, 2010 letter, ReconTrust provided a payment history for his account and a payoff statement and stated that, if he had any information or documentation indicating that the payoff calculation was incorrect, he should send copies to ReconTrust, at the address on the letter, as soon as possible. Plaintiff states that this was the address to which he sent the October 8 letter. Plaintiff argues that, because in response to his first written request, he received a response from ReconTrust, was told to send concerns to it and did so, his second written request was sent properly. Plaintiff also suggests that, if sending his second request to

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<sup>2</sup> This letter is incorporated by reference into the 2AC. See 2AC ¶ 34 (referring to the letter dated October 1, 2010 that Plaintiff received from ReconTrust and some of the contents of that letter).



1 ReconTrust did not count as a qualified written request, then BAC  
2 Home Loan Servicing did not properly respond to his first written  
3 request.

4 Plaintiff has failed to state a claim for violation of RESPA  
5 against BAC Home Loan Servicing because he does not plead that the  
6 October 8, 2010 letter was a qualified written request to that  
7 entity. RESPA imposes duties upon a loan servicer when it  
8 "receives a qualified written request from the borrower." 12  
9 U.S.C. § 2605(e)(1)(A). Plaintiff has not sufficiently alleged  
10 that he sent BAC Home Loan Servicing such a request; instead, the  
11 letter attached to his pleading states that he sent the request to  
12 ReconTrust. There is also no allegation that ReconTrust provided  
13 the request to BAC Home Loan Servicing, such that BAC Home Loan  
14 Servicing ever received it or had an opportunity to respond to it.  
15 Plaintiff suggests that the Court must consider his allegations  
16 that he sent the letter to "BAC Home Loan and ReconTrust" rather  
17 than what was written on the letter itself. Although, on a motion  
18 to dismiss, the allegations in the complaint are to be taken as  
19 true, this does not apply when the allegations are contradicted by  
20 documents of which the Court may take judicial notice. See Data  
21 Disc, Inc. v. Systems Technology Assocs., Inc., 557 F.2d 1280,  
22 1284 (9th Cir. 1977) (court may not assume truth of allegations if  
23 they are contradicted by admissible evidence). Also, although  
24 Plaintiff suggests that he could alternatively maintain a claim  
25 based on the earlier letter that he sent to BAC Home Loan  
26 Servicing, in the 2AC, Plaintiff has alleged a violation on the  
27 basis of BAC Home Loan Servicing's failure to respond properly to  
28

1 the October 8 letter and does not refer to any prior letter or  
2 purport to make a claim on the basis of such a letter.

3 Accordingly, the Court GRANTS Defendants' motion to dismiss  
4 Plaintiff's RESPA claim. Because Plaintiff has had an opportunity  
5 to correct the deficiencies in this claim, dismissal is without  
6 leave to amend.

7 CONCLUSION

8 For the reasons set forth above, the Court GRANTS Defendants'  
9 motion to dismiss Plaintiff's 2AC (Docket No 63). Because the  
10 Court grants Defendants' motion to dismiss and does not grant  
11 Plaintiff leave to amend, the lis pendens recorded on March 4,  
12 2011 in the official records of the Contra Costa County Recorder  
13 as Document No. 2011-0048382-00 is EXPUNGED.

14 The Clerk shall enter judgment and close the file.  
15 Defendants shall recover their costs from Plaintiff.

16 IT IS SO ORDERED.

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18 Dated: 2/19/2013

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CLAUDIA WILKEN  
United States District Judge